

**United States Bankruptcy Court
Northern District of Illinois
Eastern Division**

Transmittal Sheet for Opinions for Posting

Will this opinion be Published? No

Bankruptcy Caption: In re JAMES AND KATHLEEN CULLEN

Bankruptcy No. 95 B 25374

Adversary No. 99 A 621

Date of Issuance: APRIL 12, 2000

Judge: Ginsberg

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**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

In Re:)	Chapter 7
)	
James P. Cullen and Kathleen Cullen)	Bankruptcy No. 95 B 25374
)	
Debtors.)	Hon. Robert E. Ginsberg
-----)	
Judith Cullen,)	
)	
Plaintiff,)	
)	
v.)	Adv. No. 99 A 621
)	
James P. Cullen,)	
)	
Defendant.)	

Memorandum Opinion and Order

Judith Cullen, the former spouse of James Cullen, seeks a declaratory judgment providing that she holds a vested interest in James Cullen's pension benefits. James Cullen moved to dismiss the complaint for declaratory judgment. For reasons stated below, James' motion to dismiss is denied.

Facts

James Cullen ("the Debtor" or "James") and Judith Cullen ("Judith") were married on November 5, 1966. More than twenty years later, on September 6, 1990, they separated. Some two years thereafter, on August 2, 1992, they divorced, and a Judgment of Dissolution of Marriage ("Judgment of Dissolution") was entered in the Circuit Court of Cook County, Illinois. James and Judith reached an agreement regarding, among other things, maintenance, their

respective rights in marital property, and the division of that property. Their agreement was embodied in a Stipulation and Marital Settlement Agreement (“Stipulation”), was executed on August 20, 1992, and was incorporated by reference in the Judgment of Dissolution, which was signed by a state court judge.

The instant dispute involves the parties’ claims to the Debtor’s pension and related rights which he earned while he served as a Chicago police officer. The Stipulation addresses the parties’ rights in these pension and retirement benefits in Article V which states in relevant part:

- “6. The husband is a participant in the Policemen’s Annuity and Benefit Fund of Chicago. The husband’s interest in said fund is valued at \$281,083.62 and the entire interest is marital property. The parties acknowledge that the Policemen’s Annuity and Benefit Fund of Chicago is a municipal pension and under current law is not subject to a “Qualified Domestic Relations Order.” It is specifically agreed that a “Qualified Domestic Relations Order”¹ will be entered if future changes in the law make the Policemen’s Annuity and Benefit Fund of Chicago subject to such an order.
7. At such time as the husband actually begins to receive pension or retirement benefits from the Policemen’s Annuity and Benefit Fund of Chicago, the husband shall have an affirmative duty to pay 30% of the marital portion of all such benefits received to the wife, and to direct that 30% of the marital portion of any and all benefits to be paid from the plan on account of the husband’s death, be paid to the wife. The term “marital portion” means the portion of the husband’s interest in the plan acquired by the husband during the marriage. This portion is determined by multiplying any benefit to be paid to or on behalf of the husband by a fraction, the numerator of which is the number of full months from the date of the parties’ marriage or the date the husband became a member of the plan, whichever is later, to the date of the Judgment of Dissolution of Marriage, and the denominator of which is the total number of months that the husband is a member of the plan prior to benefits being paid from the plan to the husband. Such payment shall be made by the husband to the wife within five days of receipt of pension or retirement benefits from the Policemen’s Annuity and Benefit Fund of Chicago. Except as otherwise herein set forth, this payment to the wife is in satisfaction of her full

¹ A Qualified Domestic Relations Order (“QDRO”) is a statutory exception to the anti-alienation provisions required for pensions which are governed by the Employee Retirement Income Security Act (ERISA). 29 U.S.C. sec. 1056(d)(1). In general, an ex-spouse must have a QDRO in order to have an enforceable interest against a spouse’s ERISA-qualified pension. See, *In re Brown*, 168 B.R. 331, 335 n. 6 (Bankr. N.D. Ill. 1994).

marital interest in the Policemen's Annuity Benefit Fund of Chicago.”

The Illinois General Assembly passed HB 1612 on August 11, 1998. The bill changes the Illinois Pension Code by adding Section 1-119, 40 ILCS 5/1-119, which permits the entry of a Qualified Illinois Domestic Relations Order if one of the parties is a member of a public pension system. The new law became effective on July 1, 1999. Until that date, public pension funds were not subject to the entry of a Qualified Domestic Relations Order.

James has retired, or will do so in the very near future. Upon his retirement, James will begin to receive pension payments from the Policemen's Annuity Benefit Fund of Chicago (“Pension Fund”).

After he divorced Judith, James married Kathleen. On November 28, 1995, James and Kathleen Cullen filed a joint voluntary Chapter 7 bankruptcy case. On March 22, 1996, an order discharging the Debtors from their dischargeable debts was entered in the bankruptcy case. On April 25, 1996, the Cullens' bankruptcy case was closed.

Judith, James' first wife, claims that James told her that she was not entitled to any of the pension benefits he would receive from the Pension Fund because his obligations to Judith in connection with the Pension Fund were discharged in the Chapter 7 case. Judith moved to reopen the bankruptcy case to file an adversary proceeding seeking a declaration that she holds a vested interest in the Pension Fund and other relief. On April 28, 1999, this court granted Judith's motion to reopen the bankruptcy case.

On May 5, 1999, Judith filed a three count complaint giving rise to the instant adversary proceeding. In Count I of her Complaint, Judith seeks a declaratory judgment that she has a vested interest in the share of the Pension Fund awarded to her in the Judgment of Dissolution. In Count II, Judith contends that the Debtor holds her share of the Pension Fund solely as a

constructive trustee for her benefit and seeks a judgment in the amount of any funds that the Debtor has retained that belong to her under the Judgment of Dissolution. She also seeks an order requiring the Debtor in the future to turn over any funds from the Pension Fund that belong to her under the Judgment of Dissolution. In the alternative, in Count III, Judith contends that the portion of the Pension Fund awarded to her in the Dissolution Judgment is a “debt” owed to her by the Debtor, and that this debt is not dischargeable under section 523(a)(5) of the Bankruptcy Code. 11 U.S.C. sec. 523(a)(5).

The Debtor has moved to dismiss the Complaint for failure to state a claim upon which relief can be granted. According to the Debtor, Count I of the Complaint is barred by principles of res judicata and collateral estoppel and should be dismissed. Count II of the Complaint should be dismissed because the imposition of a constructive trust on a portion of the Pension Fund is improper. Count III should be dismissed because any interest that Judith has in the Pension Fund is “marital property” according to the Judgment of Dissolution and cannot be redesignated as “alimony, maintenance or support” at this time.

Jurisdiction and Procedure

The court has jurisdiction over this matter under 28 U.S.C. § 1334(b) as a matter arising under section 541 of the Bankruptcy Code. 11 U.S.C. sec. 541. This matter is a core proceeding under 28 U.S.C. § 157(b)(2)(A) and is before the court pursuant to Internal Operating Procedure 15(a) of the United States District Court for the Northern District of Illinois, automatically referring bankruptcy cases and proceedings to this court for hearing and determination.

Standards for Motion to Dismiss

To prevail on the motion to dismiss, it must clearly appear from the pleadings that Judith could prove no set of facts in support of her claim which would entitle her to relief. *Conley v.*

Gibson, 355 U.S. 41 (1957); *Swanson v. Wabash, Inc.*, 577 F. Supp. 1308 (N.D. Ill. 1983). The issue is not whether Judith will ultimately prevail, but whether she has pled a theory of a cause of action sufficient to entitle her to offer evidence to support her claim. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). For purposes of resolving a motion to dismiss, both the facts alleged in the complaint and reasonable inferences drawn from these facts are considered in the light most favorable to the plaintiff. *Ed Miniat, Inc. v. Globe Life Ins. Group, Inc.*, 805 F.2d 732, 733 (7th Cir.1986), *cert. denied*, 482 U.S. 915 (1987).

Discussion

James contends that Count I of the Complaint is barred by principles of res judicata and collateral estoppel. The real issue James raises is the nature of Judith's interest in the Pension Fund. The Debtor contends that the Judgment of Dissolution did not give Judith an ownership interest in the Pension Fund, and that because division of the Pension Fund was addressed and resolved in the divorce proceedings, Judith cannot revisit that issue at this time. The Debtor states:

“The Circuit Court of Cook County determined the pension was to be property. Because it was found that Judith had no vested interest, the court created a “ (sic) process for dividing the property by placing an ‘affirmative duty’ to pay on James. Plaintiff cannot now assert that she has a vested interest. Nor can she, contrary to the Rooker-Feldman doctrine, use this Court to challenge the determination of the state court. The Circuit Court determined that according to statute, no interest could vest in Plaintiff, based on the type of pension James Cullen participated in and on Illinois law controlling such pensions. This court has no authority to review and revise that decision. Thus, plaintiff (sic) is estopped from re-litigating this issue.” *Defendant's Memorandum in Support of Motion to Dismiss*, p. 4-5.

The Debtor contends that because a qualified domestic relations order (“QDRO”), was not entered by the state court prepetition (and indeed could not be entered under then applicable Illinois law), Judith does not have a vested interest in the Pension Fund. Judith, on the other

hand, responds that when the Judgment of Dissolution was entered, her right to a portion of the Pension Fund, as set out in the Judgment of Dissolution, vested. *In re Brown*, 168 B.R. 331 (Bankr. N.D. Ill. 1994); *In re James R. Carter*, 1996 WL 374127 (N.D. Ill. 1996).

In *In re Brown*, 168 B.R. 331 (Bankr. N.D. Ill. 1994), this court made it clear that upon the entry of a final divorce decree, the former spouse's interest in the debtor's pension became the former spouse's sole and separate property. *Id.* at 335. The court also noted that, even in the absence of a QDRO, the former spouse had an equitable interest in the debtor's pension. *Id.* at 335 note 6.

A QDRO permits a former spouse to enforce preexisting property rights against an ERISA-qualified pension plan. *Brown*, 168 B.R. at 335; *In re Long*, 148 B.R. 904, 906 (Bankr. W.D. Mo. 1992). A QDRO does not create or determine the spouses' interests in a pension fund. The entry of a QDRO would not determine the nature of Judith's interest in the marital portion of James' Pension Fund. *Brown* at 335. Under the Judgment of Dissolution, James' interest in the marital portion of the Pension Fund was reduced by 30%, and Judith was awarded a 30% interest in the marital portion of James' Pension Fund. When the Judgment of Dissolution, which provides for the division of the parties' interests in the Pension Fund, was signed, i.e., entered by the court, Judith's interest in the Pension Fund vested. *Brown*, 168 B.R. at 335. Accordingly, the Debtor's motion to dismiss Count I of the Complaint is denied.

Once Judith's interest in the Pension Fund vested, the benefits became Judith's property, and were no longer James' property. As the court explained in *Brown*, the mere fact that the pension benefits are to be paid to James does not change the fact that those benefits belong to Judith, because James holds any benefits that have come into his possession or control after the entry of the Judgment of Dissolution as a constructive trustee. *Id.* at 335 (citations omitted). As

a constructive trustee, James holds only bare legal ownership in Judith's portion of the Pension Fund , while Judith holds the equitable interest. *Id.* Under section 541(d) of the Bankruptcy Code, property in which the debtor holds only legal title and not an equitable interest, is not property of the estate. 11 U.S.C. sec. 541(d). Thus, Judith's portion of the Pension Fund is Judith's property and is not property of the Debtor's bankruptcy estate. The Debtor's motion to dismiss Count II of the Complaint must be denied.

In Count III, which Judith pled in the alternative, Judith contends that the Debtor's obligation to pay her a portion of the Pension Fund is nondischargeable under section 523(a)(5) of the Bankruptcy Code. 11 U.S.C. sec. 523(a)(5). The Debtor concedes that his obligation to pay a portion of the Pension Fund to Judith is a "debt," as defined in section 101(12) of the Bankruptcy Code. 11 U.S.C. sec. 101(12). The Debtor moves to dismiss this count, arguing that his obligation was discharged. The Debtor contends that the Pension Fund is marital property, and its division was a property settlement that cannot, as a matter of law, be redesignated at this time as "alimony, maintenance or support" under section 523(a)(5) of the Bankruptcy Code. 11 U.S.C. sec. 523(a)(5).

The characterization of a debt as being in the nature of alimony, maintenance, or support is determined under federal bankruptcy law, not state law. *In re Reines*, 142 F.3d 970, 972 (7th Cir. 1998). The substance of the obligation is important, not the label imposed by state law. *See In re Maitlen*, 658 F.2d 466, 468 (7th Cir. 1981); *In re Woods*, 561 F.2d 27, 29 (7th Cir. 1977); *In re Paneras*, 195 B.R. 395, 401(Bankr. N. D. Ill. 1996).

Courts consider several factors in determining whether a debt is in the nature of support or maintenance or whether it is a property settlement, including: (1) whether the obligation terminates upon the death or remarriage of either spouse; (2) whether the obligation is payable in

a lump sum or in installments over a period of time; (3) whether the payments attempt to balance the parties' income; (4) the characterization of the obligation in the decree; (5) whether there is a separate mention of support payments; (6) whether there are children to support; (7) whether there is a large differential in net income; (8) whether it was contemplated that the obligation was taxable to the recipient ; and (9) whether maintenance was waived. *See In re Woods*, 561 F.2d 27 (7th Cir. 1977); *In re Maitlen*, 658 F.2d 466 (7th Cir. 1981); *In re Kaczmariski*, 245 B.R. 555 (Bankr. N.D. Ill. 2000); *In re Paneras*, 195 B.R. 395, 401-02 (Bankr. N. D. Ill. 1996).

Based on its consideration of the above factors, the court concludes that the debt arising from the division of the Pension Fund, if Judith does not hold a vested property interest, is a property settlement, and not in the nature of alimony, maintenance or support. Article IV of the Stipulation deals with property settlement , and Article V of the Stipulation deals with pension and retirement benefits. Article VII of the Judgment of Dissolution refers to the “property settlement” described in the Stipulation, and recites that the property settlement fully settled all issues between the parties in connection with support and maintenance. In addition, the parties waived any claims for support, maintenance and alimony under the provisions of Article VII of the Stipulation, and no payments are classified as support payments. The Stipulation refers to the Pension Fund as marital property. None of Judith’s and the Debtor’s children require support. It appears clear to the court that the parties intended their agreement with respect to the division of the Pension Fund to be a property settlement. Thus, the court finds that the Pension Fund debt is a property settlement.

Whether a property settlement is dischargeable is determined by section 523(a)(15) of the Bankruptcy Code. 11 U.S.C. sec. 523(a)(15). Section 523(c) of the Bankruptcy Code provides that a debt that would be nondischargeable under 523(a)(15) of the Bankruptcy Code is

nevertheless dischargeable unless the court determines that the debt is not dischargeable. 11 U.S.C. sec. 523(c). The time for bringing a complaint to determine the dischargeability of certain kinds of debts, including property settlements, under section 523(c) of the Bankruptcy Code is fixed by Fed. R. Bankr. P. 4007(c). Under that Rule, Judith had 60 days following the date first set for the meeting of creditors to be held pursuant to section 341 of the Bankruptcy Code to file a complaint seeking a determination of whether the Debtor's obligation to her was dischargeable. The first meeting of creditors was set for January 4, 1996. The time for filing a complaint to determine the dischargeability of a property settlement has long since run. Accordingly, the Debtor's motion to dismiss Count III of the Complaint is granted.

Judith has also moved for the imposition of sanctions against the Debtor and his attorney, Forest Ingram, pursuant to Fed. R. Bankr. P. 9011. Judith contends that the Debtor and his attorney have delayed and multiplied the proceedings. The court has examined the actions taken by the Debtor and his attorney in connection with Judith's Complaint. The court cannot find that the actions of the Debtor and his attorney were frivolous. When Judith initially presented her "Motion Seeking Declaration That the Debtor's Ex-Spouse Holds a Vested Interest in the Debtor's Pension Benefits," the Debtor's bankruptcy case had been closed. The Debtor properly argued that the Debtor's bankruptcy case needed to be reopened, and that an adversary proceeding was required to determine the nature of Judith's interest in the Pension Fund. Fed. R. Bankr. P. 4007. While adherence to the proper procedural process delayed resolution of the issue of the nature of Judith's interest in the Pension Fund, the Debtor's actions were entirely correct. Nor were the Debtor or his attorney acting improperly when they sought time to respond to Judith's motion to reopen the Debtor's bankruptcy case. The Debtor and his attorney sought additional time to respond to the Complaint and to file the reply in support of the motion to

dismiss the Complaint, and the court granted a two-week extension of time in each instance. The Debtor and his attorney did not seek additional extensions of time. Based on these facts, the court cannot find that either the Debtor or his attorney abused the judicial process or acted in a manner to warrant the imposition of sanctions.

Conclusion

For the reasons stated, the Debtor's motion to dismiss Counts I and II of the Complaint is denied. The Debtor's motion to dismiss Count III of the Complaint is granted. Judith Cullen's motion for sanctions is denied. Leave is given to the Debtor to file and serve an answer or otherwise plead to the remaining counts of the Complaint on or before May 8, 2000. Status on the Complaint is set for May 15, 2000 at 10:00 a.m.

ENTERED:

Dated: April 12, 2000

Robert E. Ginsberg
United States Bankruptcy Judge